IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 140 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

COMMISSIONER OF INCOME-TAX

Versus

VIDYAGAURI NATVERLAL

Appearance:
MR Mihir Joshi with MANISH R BHATT for Petitioner
NOTICE SERVED for Respondent No. 1, 2, 3, 4

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 06/11/98

ORAL JUDGEMENT

Per Balia,J.

As required by this court on an application having been made by the Commissioner of Income tax ,Ahmedabad under Section 256 (2) of the Income tax Act, a statement of case has been submitted by the Income tax Appellate

Tribunal,Ahmedabad and following questions of law have been referred for decision of this court:

"1. Whether the disclosure in part III of the return of income is sufficient disclosure for the purpose of Income tax Act, 1961 for the assessee to discharge this burden ?

2. Whether on the facts and in the circumstances of the case,the Income tax Appellate Tribunal was right in law in deleting the penalty imposed by the Inspecting Assistant Commissioner under Section 256 (1)(c) of the Income tax Act, 1961?

3. Whether the finding of the Appellate Tribunal that the assessee did not conceal the particulars of his income furnished inaccurate particulars of such income, is correct in law and sustainable from any material on record ?

4. Whether in view of the statement of the assessee recorded earlier claiming the amount disclosed in part III of the return as representing Matka collections and subsequently claiming the same to be being borrowings from shroffs, the Income tax Appellate Tribunal was justified in law in not upholding the penalty imposed under section 271(I) (c) of the Act?"

The original assessee is dead during the pendency of this Reference and the legal representatives are brought on record and they have chosen not to appear in spite of notice having been served on them.

As we will presently see, questions Nos. 1,2 and 3 really form part of the same question and in our opinion, question No.4 does not arise out of the Tribunal's order. We shall be considering the decision on the question as we propose to reframe to bring out the real controversy arising out of the Tribunal's order.

For the assessment year1972-73, in the return filed by the assessee in part III of the return, he disclosed cash credit in his books of account to the extent of Rs. 1,35,000/- as monies borrowed from three different persons. During the course of assessment proceedings, explanation about the nature and source of such cash credits were not found to be satisfactory by the revenue and the same were considered to be income of the assessee for the previous year. As the returned income of the assessee was less than 80% of the assessed income, a

presumption arose against the assessee that he has concealed the particulars of his income or has furnished inaccurate particulars for the purpose of its applicability of section 271 of the Act as it stood then.Proceedings for imposing penalty for concealment of particulars of income or for furnishing inaccurate particulars were initiated against the assessee.

After taking into consideration the materials which were before the assessing officer including the fact that when the assessee was found in possession of Rs. 1,35,000/by the concerned authority,in the search proceedings during the previous year in question, the same was explained to be income of receipts of the assessee from Matka business ,the authority came to the conclusion that the explanation in response to the notice under Section 271 (c) in the penalty proceedings is not acceptable to rebut the presumption arising against the assessee and levied the penalty.The assessing authority in the course of assessment proceedings held that the explanation offered by the assessee was an afterthought and not genuine one and IAC who was the authority having jurisdiction to impose penalty in penalty proceedings came to positive findings that the facts as stated by the assessee in part III are false. He also came to the conclusion that the ITO had shown conclusively that the assessee did not in fact borrow the amount from three persons as disclosed in part III of the return.In the face of this finding about falsehood of the statement made in the return, penalty for concealment was levied. On appeal before the Tribunal,it disposed of the appeal on the sole reasoning that the amount of Rs.1,35,000/having been admittedly disclosed by the assessee in part III of the return of income,it cannot be said that the assessee concealed the particulars of his income or furnished inaccurate particulars of such income.Solely on that ground, it was held that merely because the explanation offered by the assessee under section 68 has been rejected and cash credit has been added as income from undisclosed sources for the assessment year in question, alone is not sufficient to levy penalty.This later conclusion is not based on application of mind to material before the Tribunal, but on the basis that disclosure in part III of the return makes it a case of disclosure of particulars and accurate particulars within the meaning of Section 271 (1) (c).Thus, the Tribunal decided the question only on that ground that disclosure of receipts in part III of the return takes the case out of purview of concealment of particulars of income did not think it fit to consider the material on record and to apply his mind to the question whether the assessee can be said to have

disclosed particulars of his income accurately or is not guilty of disclosing inaccurate particulars. The only question,therefore, which arises out of the Tribunal's order is-

"Whether in the facts and circumstances of the case, solely on the ground that the assessee has disclosed receipts in part III of the return filed by him, a conclusion can be reached that the assessee is not guilty of concealing particulars of his income or for furnishing inaccurate particulars".

To us,it appears obvious that such wide proposition as has been propounded by the Tribunal cannot be accepted as a matter of law. The word 'concealment' inherently carries with it the element of mens rea.Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if takes out the case from the purview of non-disclosure, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. In any case, disclosure which has been made in any part of the return which is incorrect or false to the knowledge of the assessee and if that fact is established, such disclosure cannot take it out from the purview of the act of concealment of particulars of income or act of furnishing inaccurate particulars for the purpose of levy of penalty. Considering all these facts, whether the particulars furnished are true and correct or whether the particulars furnished by the assessee are inaccurate and whether the particulars furnished by the assessee are inaccurate or incorrect to his knowledge, all are questions which require an inquiry into the facts and consideration of the material on record before arriving at any conclusion whether the penalty is to be imposed or not,depending on the finding reached as a result of that inquiry. The process of inquiry into the correctness,truthfulness or accuracy of the particulars furnished by the assessee cannot be closed at the threshold by looking at the return .That would negative and render otiose the very provisions of the statute.

In the context of section 68, if one were to examine the position of law, it is to be seen that section 68 comes into operation only when some amount is found credited in the books of an assessee maintained for any previous year that is to say- in every case,of examination of source of cash credit commences only on disclosure of receipt from one or other party in the books of the assessee . Yet, the law envisages enquiry into these particulars and also envisages , if on such inquiry, the explanation and

information furnished by the assessee is not found satisfactory, the same is deemed to be income of that year so much as to the question of assessment of income for the previous year in which disclosure about cash credit finds place.

Coming to penalty proceedings, at the outset,we may say that it is not the case of even the assessee that in no case, where such disclosed cash credit amount is treated as income and assessed as income of that year, it cannot be subjected to penalty proceedings. Accepting the principle on which the Tribunal has acted would render the penalty proceedings for concealment in such case even if it is established from the evidence that entries made in the books of account were bogus to the knowledge of the assessee ,no penalty proceedings under section 271 (1) (c) can be sustainable because as soon as entries in the books of account have been disclosed to the revenue showing the cash credit entered with particulars thereof, there cannot be any concealment of particulars of income or furnishing of inaccurate particulars thereof.The expression of principle that mere rejection of explanation is not sufficient to sustain penalty is not backed up by necessary enquiry.It may be noticed that as per rule of evidence,there is distinction between set of facts 'not proved' and facts disproved and facts proved. Benefit of the principle that mere nonsatisfactory nature of explanation furnished cannot amount to proof of falsity of explanation furnished can apply in case the fact finding authority reaches to a stage where it can only conclude that the fact alleged is 'not proved' which would result that except rejection of the explanation furnished by the assessee, there is no material to sustain the plea of concealment. But on the other hand, if the state of affairs reveals a stage where one can positively reach a conclusion that the fact alleged is proved or disproved, the principle that mere rejection of explanation cannot result in levy of penalty will have no application. To reach this stage also, inquiry will have to be undertaken of the disclosure made in the return or in the statement annexed to the return and to arrive at a finding whether the particulars disclosed are truthful, are false or not proved to be satisfactory. The principle to which the Tribunal has referred would apply in the last case. In the first case, it would be a positive case of no concealment, in the second stage, it would be a positive case of concealment and in the third case, benefit of doubt will go in favour of the assessee. But in either case, inquiry must proceed from the stage the alleged disclosure has taken place and not stop at that stage and close the inquiry at the threshold on the

abstract principle that mere rejection of explanation does not result into levy of penalty. The Tribunal has obviously erred in stopping at that stage and not considering the material before it on the basis of which the authority levying penalty has come to a positive finding as noticed by us.

As an illustrative case, can it be said even if it is found positively that money was not borrowed at all or not borrowed from the persons whose name has been disclosed that the particulars disclosed by the assessee showing that the disputed amount has been borrowed by him or particulars furnished by him are accurate ? Can it be said in a case where it is positively found that the assessee has not borrowed the same which he claims to have borrowed ,mere disclosure of fact that money is received fulfils the condition of accurate disclosure of the income so as to take out the case from the purview of Explanation to section 271 (1) (c).In our opinion, the answer must be in plain negative ,else, the very purpose and object shall be defeated and the provisions will be rendered otiose because in no case,it will be a case of non- disclosure. The Tribunal appears to have ignored that even where there is some disclosure penalty may still be imposed if disclosures in the return are inaccurate. In our opinion, the principle appears to be plain from the reading of the statute itself. Still, if any authority is needed,reference may be made to decisions of various High courts :

(1) Kantilal Manilal vs. CIT, 130, ITR 411
(2) CIT vs Suleman Abdul, 139 ITR 8.
(3) CIT vs. Namlabhai Bhanabhai,163 ITR 189
(4) CIT vs. Smt. Vilasben Hasmukhlal Shah, 192 ITR 214 and
(5) CIT vs. Abdulgafur Ahmed Wagmar,199 ITR 827.

Except the first case, all other cases relate to disclosure of particulars of income under part IV of the return by the assessee concerned. Like argument that the assessee having disclosed income particulars of receipt of claims to be exempt the fact that his claim for exemption was not accepted, cannot result in levy of penalty by holding that mere disclosure in part IV of the return would not absolve the assessee from scrutiny of facts whether the disclosure made by him is true or false. Whereas, in the first referred case, when the assessing authority found that there has been manipulation of accounts and the assessee's explanation was found to be wholly untrue, levy of penalty was held to be valid and the contention that mere rejection of

explanation for the purpose of adding that sum in the returned income cannot result in levy of penalty ,was rejected in the facts and circumstances of that case. This is to emphasise that inquiry into the question about disclosure or accuracy of disclosure cannot be stopped while looking at the disclosure made in the return. In fact, this is the starting point of inquiry whether such disclosures are truthful or accurate.

We are,therefore,of the opinion that the question as reframed by us should be answered in negative that is- in favour of the revenue and against the assessee. There shall be no order as to costs.

--